



## MSRB NOTICE 2010-47 (NOVEMBER 1, 2010)

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### APPLICATION OF MSRB RULES TO MUNICIPAL ADVISORS

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Effective October 1, 2010, Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203 (the “Dodd-Frank Act”), broadened the mission of the Municipal Securities Rulemaking Board (the “MSRB”) to include the protection of municipal entities[1] and obligated persons in addition to the protection of investors and the public interest. The Dodd-Frank Act also requires the MSRB to adopt rules with respect to municipal advisors[2] and provides for municipal advisor representation on the Board of the MSRB (the “Board”), which as of October 1 has a majority of public, independent members.[3]

The MSRB today filed with the Securities and Exchange Commission (the “SEC”) several proposed rule changes that extend certain core MSRB rules of conduct to municipal advisors, as well as proposed rule changes that, among other things, will permit municipal advisors to begin registering with the MSRB.[4] This notice describes the proposed rule changes and provides guidance to municipal advisors about the application of MSRB rules in connection with the transition to the new regulatory structure for municipal advisors.

“Municipal advisors” include businesses and individuals that advise municipal entities concerning municipal financial products and municipal securities, as well as businesses and individuals who solicit certain types of business from municipal entities on behalf of unrelated broker-dealers, municipal advisors, or investment advisers. Municipal advisors include many market participants not previously subject to regulation by the MSRB, as well as certain brokers, dealers, and municipal securities dealers (“dealers”) whose activities already are subject to MSRB rules. For more detail on the definition of a “municipal advisor,” see “Definitional Rules/*Municipal Advisor*” below.

The Dodd-Frank Act provides that MSRB rules for municipal advisors must, among other things: (1) promote fair dealing, the prevention of fraudulent and manipulative acts and practices, and the protection of investors, municipal entities, and obligated persons; (2) prescribe means reasonably designed to prevent acts, practices, and courses of business that are not consistent with a municipal advisor’s fiduciary duty to its municipal entity clients; (3) prescribe professional standards; (4) provide continuing education requirements; (5) provide for periodic examinations; (6) provide for recordkeeping and record retention; and (7) provide for reasonable fees and charges necessary or appropriate to defray the costs and expenses of operating and administering the Board. MSRB rules may not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

#### **RULEMAKING IN CONNECTION WITH MUNICIPAL ADVISORS**

As currently written, MSRB rules expressly apply solely to dealers. Rulemaking by the MSRB will be necessary to adapt existing rules and to adopt new rules for municipal advisors and the activities they undertake, except with respect to those municipal advisors that are dealers providing financial advisory services to issuers of municipal securities (“dealer financial advisors”), to which MSRB rules already apply. Otherwise, no MSRB rules are currently applicable to municipal advisors, except as described in this notice.

The MSRB has adopted a series of proposed rule changes, consisting of certain new or amended MSRB rules that have been or will be filed with the SEC and apply or will apply to all municipal advisors (including dealer financial advisors). These rules are primarily administrative in nature. Some relate to the process by which a municipal advisor would register with the MSRB. Others are definitions. One rule addresses the consequences of SEC disciplinary actions. One is a rule of conduct: Rule G-17 (on fair dealing). These proposed rule changes are described below.

The MSRB will be developing additional rules for municipal advisors over the coming months and years. The Board expects to adopt a rule governing “pay to play” in a manner comparable to existing Rule G-37 and a rule on gifts and gratuities. It also expects to provide guidance on the definition of “municipal advisor” and what it means for a municipal advisor to have a fiduciary duty to a municipal entity, as provided for in the Dodd-Frank Act.[5] The development of professional qualifications tests and continuing education requirements for municipal advisors will begin in the near future. Such rulemaking will be undertaken through the MSRB’s normal public comment and SEC filing process, through which the MSRB hopes to receive significant input from municipal advisors, municipal entities, obligated persons, and other key market participants. The MSRB also expects to conduct additional outreach activities with the municipal advisor community to ensure that it has ample opportunity to participate in the transition to a regulated environment.

## **DISCUSSION OF PROPOSED RULE CHANGES**

### Administrative Rules and Municipal Advisor Registration Process

The MSRB has amended a number of its administrative rules to apply to municipal advisors, as well as to dealers. The text of these amended rules, as well as amended Form G-40,[6] can be found at the end of this notice. Some of these rules (A-12 (initial fee), A-14 (annual fee), and G-40 (electronic mail contacts)) describe the process for registering with the MSRB.[7]

Before a municipal advisor may register with the MSRB, it must first register with the SEC as a municipal advisor. Even though dealer financial advisors are already registered with the SEC as broker-dealers, they must register separately with the SEC as municipal advisors. All municipal advisors will need an SEC registration number before they may register with the MSRB.

Only municipal advisor businesses are required to register with the MSRB. Individuals are not required to register with the MSRB as municipal advisors, unless they are sole proprietorships. Instructions on how to register with the MSRB on behalf of a municipal advisor business will be posted on the MSRB website ([www.msrb.org](http://www.msrb.org)) under “Municipal Advisor News.” Municipal advisors must complete the MSRB registration process by December 31, 2010, including completion of Form G-40 and payment in full of the initial fee and annual fee. Although dealer financial advisors already registered with the MSRB are also required to register as a municipal advisor, the initial and annual fees are assessed per registrant and therefore are payable only once even if a firm is registered both as a dealer and a municipal advisor.

### Definitional Rules [8]

*Associated Person.* MSRB Rule D-11 (associated person) has been amended to include associated persons of municipal advisors.

*Municipal Advisor.* Section 15B(e)(4) of the Securities Exchange Act, as amended by the Dodd-Frank Act (as amended, the “Act”), provides limited exceptions to the definition of “municipal advisor.” They are: (i) a municipal entity;[9] (ii) a dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933; 15 U.S.C. 77b(a)(11)); (iii) any investment adviser registered under the Investment Advisers Act of 1940 that is providing investment advice;[10] (iv) any commodity trading advisor registered under the Commodity Exchange Act that is providing advice related to swaps;[11] (v) attorneys offering legal advice or providing services that are of a traditional legal nature; and (vi) engineers providing engineering advice.

*Municipal Advisory Activities.* New MSRB Rule D-13 defines the term “municipal advisory activities” to mean the activities described in Section 15B(e)(4)(i) and (ii) of the Act.

*Appropriate Regulatory Agency.* New MSRB Rule D-14 defines “appropriate regulatory agency” with respect to municipal advisors.

### SEC Disciplinary Actions

Just as municipal advisors must register with the SEC before they may conduct municipal advisory activities, so too must they cease such activities if ordered to do so by the SEC. The MSRB has amended its Rule G-5 (disciplinary actions by appropriate regulatory agencies) so that it applies to municipal advisors, as well as brokers, dealers, and municipal securities dealers. The rule is also amended to remove an outdated reference to an NASD rule. The amendments to Rule G-5 would become effective upon approval by the SEC. The rule text can be found at the end of this notice.

#### Rule on Fair Dealing

The MSRB has amended its Rule G-17 to apply to municipal advisors. The text of amended Rule G-17 can be found at the end of this notice.

Frequently referred to as the MSRB's "fair dealing" rule, Rule G-17 prescribes a code of conduct for all entities and associated persons regulated by the MSRB. Not only must they not engage in conduct that is deceptive, dishonest, or an unfair practice, but they also have an affirmative duty to deal fairly with all persons. The fair dealing principles of Rule G-17 are fundamental to all MSRB rulemaking and the rule's coverage has been extended to municipal advisors pursuant to Congress's direction to the Board in the Dodd-Frank Act to adopt rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

November 1, 2010

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### **TEXT OF PROPOSED RULE CHANGES[12]**

#### **Rule A-7: Assessments**

The Board shall, by rule, provide for the costs and expenses of its operation and administration by levying such fees and charges on brokers, dealers, **and** municipal securities dealers, **and municipal advisors** as may be determined necessary or appropriate by the Board.

#### **Rule A-8: Rulemaking Procedures**

(a) *Adoption of Proposed Rules and Submission to Commission.* The Board shall adopt such proposed rules as the Board shall deem necessary or appropriate to effect the purposes of the Act with respect to transactions in municipal securities effected by brokers, dealers and municipal securities dealers, **and municipal advisory activities engaged in by municipal advisors**, including, as a minimum, proposed rules relating to those matters prescribed in section 15B(b)(2)(A) through ~~(K)~~ of the Act. Upon their adoption by the Board, the Board shall submit proposed rules to the Commission in accordance with the procedures set forth in section 19(b) of the Act and shall file such proposed rules with the appropriate regulatory agencies in accordance with the provisions of section 17(c) of the Act. A proposed rule of the Board shall become a rule of the Board upon its approval by the Commission, pursuant to section 19(b)(2) of the Act, or upon filing with the Commission in accordance with the provisions of section 19(b)(3)(A) of the Act, or upon the determination of the Commission in accordance with the provisions of section 19(b)(3)(B) of the Act. Documents required to be submitted to the Commission in connection with the proposed rules of the Board shall be signed on behalf of the Board by the Secretary of the Board, or by any person designated by the Board for that purpose by resolution.

(b) *Advisory Opinions and Interpretations.* The Board may from time to time render or cause to be rendered advisory opinions and interpretations of rules of the Board at the request of any interested person. Such opinions and interpretations shall represent the Board's intent in adopting the rules which are the subject of such opinions and interpretations.

(c) *Procedures.* The Board may from time to time prescribe and amend procedures relating to the administration of Board rules. Such procedures and amendments may be approved by the Board pursuant to rule A-4(d).

Each broker, dealer, ~~and~~ municipal securities dealer, ~~and~~ **municipal advisor** shall be subject to such procedures and amendments thereto in the same manner as the broker, dealer, ~~and~~ municipal securities dealer, ~~and~~ **municipal advisor** is subject to the rules of the Board.

Procedures and amendments thereto shall become effective no earlier than 10 business days after publication of such procedures and amendments.

(d) *Access to Board Rules and Other Action.* The Board shall establish procedures designed to provide access by all interested persons to rules of the Board and other official Board action, and otherwise to keep all interested persons informed and advised of all such rules and action.

#### **Rule A-12: Initial Fee**

Prior to effecting any transaction in or inducing or attempting to induce the purchase or sale of any municipal security, **or engaging in municipal advisory activities**, a broker, dealer, ~~or~~ municipal securities dealer, **or municipal advisor** shall pay to the Board an initial fee of \$100, accompanied by a written statement setting forth the name, address and Securities and Exchange Commission registration number of the broker, dealer, ~~or~~ municipal securities dealer, **or municipal advisor** on whose behalf such fee is paid. The Commission registration number shall also be set forth on the face of the remittance. Such fee shall be payable at the offices of the Board. In the event any person subject to this rule shall fail to pay the required fee, the Board may recommend to the Commission that the registration of such person with the Commission be suspended or revoked. **No municipal advisor shall be in violation of this rule for failure to pay this initial fee in advance of January 1, 2011.**

#### **Rule A-14: Annual Fee**

In addition to any other fees prescribed by the rules of the Board, each broker, dealer, ~~and~~ municipal securities dealer, ~~and~~ **municipal advisor** shall pay an annual fee to the Board of \$500, with respect to each fiscal year of the Board in which the broker, dealer, ~~or~~ municipal securities dealer, **or municipal advisor** conducts municipal securities activities **or municipal advisory activities**. **Except as set forth below, such fee must be received at the office of the Board no later than October 31 of the fiscal year for which the fee is paid, accompanied by the invoice sent to the broker, dealer, ~~or~~ municipal securities dealer, **or municipal advisor** by the Board, or a written statement setting forth the name, address and Commission registration number of the broker, dealer, ~~or~~ municipal securities dealer, **or municipal advisor** on whose behalf the fee is paid. **No municipal advisor shall be in violation of this rule for failure to pay this annual fee in advance of January 1, 2011.****

#### **D-11: "Associated Persons"**

Unless the context otherwise requires or a rule of the Board otherwise specifically provides, the terms "broker," "dealer," "municipal securities broker," "municipal securities dealer," ~~and~~ "bank dealer," ~~and~~ **municipal advisor** shall refer to and include their respective associated persons. Unless otherwise specified, persons whose functions are solely clerical or ministerial shall not be considered associated persons for purposes of the Board's rules.

#### **D-13: "Municipal Advisory Activities"**

**"Municipal advisory activities" means the activities described in Section 15B(e)(4)(A)(i) and (ii) of the Act.**

#### **D-14: "Appropriate Regulatory Agency"**

**With respect to a broker, dealer, or municipal securities dealer, "appropriate regulatory agency" has the meaning set forth in section 3(a)(34) of the Act. With respect to municipal advisors, "appropriate regulatory agency" means the Commission.**

#### **Rule G-5: Disciplinary Actions by Appropriate Regulatory Agencies; Remedial Notices by Registered Securities Associations**

(a) No change

(b) No broker, dealer or municipal securities dealer that is a member of a registered securities association shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any municipal security, or otherwise act in contravention of or fail to act in accordance with rules adopted by the association ~~as of April 3, 1984~~, pertaining to remedial activities of members experiencing financial or operational difficulties, as if such rules were applicable to such broker, dealer or municipal securities dealer.

**(c) No municipal advisor shall engage in municipal advisory activities in contravention of any effective restrictions imposed upon such municipal advisor by the Commission pursuant to section 15B(c)(2) or (3) of the Act, and no natural person shall be associated with a municipal advisor in contravention of any effective restrictions imposed upon such person by the Commission pursuant to section 15B(c)(4) of the Act.**

#### **Rule G-17: Conduct of Municipal Securities and Municipal Advisory Activities**

In the conduct of its municipal securities or municipal advisory activities, each broker, dealer, ~~and~~ municipal securities dealer, and municipal advisor shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.

#### **Rule G-40: Electronic Mail Contacts**

(a)(i) Each broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor shall maintain an Internet electronic mail account to permit communication with the MSRB, and shall appoint a Primary Electronic Mail Contact to serve as the official contact person for purposes of electronic mail communication between the broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor and the MSRB. Each Primary Electronic Mail Contact of a broker, dealer, or municipal securities dealer shall be a registered municipal securities principal (Series 53 or Series 51) of the broker, dealer or municipal securities dealer.

(ii) Each broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor may appoint an Optional Electronic Mail Contact for purposes of electronic mail communication between the broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor and the MSRB.

(b)(i) Upon completion of its Rule A-12 submissions and assignment of an MSRB Registration Number, each broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor shall electronically submit to the MSRB a completed Form G-40 setting forth, in the prescribed format, the following information:

- (A) The name of the broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor and the date.
- (B) The MSRB Registration Number of the broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor, including any separate MSRB Registration Number assigned if registered both as a municipal advisor and a broker, dealer, or municipal securities dealer.
- (C) The name of the Primary Electronic Mail Contact, and his/her electronic mail address and telephone number.
- (D) The name of the Optional Electronic Mail Contact, if any, and his/her electronic mail address and telephone number.
- (E) The name, title and telephone number of the person who prepared the form.
- (F) In the case of a municipal advisor, the categories of municipal advisor that describe the municipal advisor as provided on Form G-40.**

(ii) A broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor may change the ~~name of its Electronic Mail Contacts or other~~ information previously provided by electronically submitting to the MSRB an amended Form G-40. In addition, each broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor shall update its ~~required Primary Electronic Mail Contact~~ information promptly, but in any event not later than 30 days following any change in such information.

(c)(i) Each broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor shall review and, if necessary, update its information ~~on its Primary Electronic Mail Contacts~~ and submit such information electronically to the MSRB within 17 business days after the end of each calendar year.

(ii) Any broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor that, during the 17 business-day update period, submits its initial Form G-40 or modifies or affirms its information ~~relating to its Primary Electronic Mail Contact~~ shall be deemed to be in compliance with the annual update requirement applicable to the year immediately preceding that 17 business-day update period.

(d) Each broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor shall promptly comply with any request by the appropriate regulatory agency ~~(as defined in Section 3(a)(34) of the Act)~~ for required ~~Primary Electronic Mail Contact~~ information, but in any event not later than 15 days following any such request, or such longer period that may be agreed to by the appropriate regulatory agency.

**(e) No municipal advisor shall be in violation of this rule for failure to complete Form G-40 in advance of January 1, 2011.**

#### **FORM G-40 [13]**

**(Items to be provided pursuant to Rule G-40(b)(i))**

**(1) The MSRB Registration Number or Numbers of the broker, dealer, municipal securities dealer, or municipal advisor organization.**

**(2) The name of the organization and the date.**

**(3) The name of the person designated by the organization as its Primary Electronic Mail Contact.**

**(4) The e-mail address and telephone number of the Primary Electronic Mail Contact.**

**(5) The name of the Optional Electronic Mail Contact, if any, designated by the organization.**

**(6) The e-mail address and telephone number of the Optional Electronic Mail Contact, if any.**

**(7) The name, title, and telephone number of the person who prepared the form.**

**(8) For municipal advisors only, the category or categories of municipal advisor.**

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[1] "Municipal entity" is defined in Section 15B(e)(8) of the Securities Exchange Act of 1934, as amended by the Dodd-Frank Act (the "Exchange Act"). A copy of revised Section 15B may be found on the MSRB website at <http://www.msrb.org/MSRB-For/Municipal-Advisors/Securities-Exchange-Act-Section-15B.aspx>.

The MSRB has previously interpreted its Rule G-17 to require brokers, dealers, and municipal securities dealers to deal fairly with all persons, including issuers of municipal securities. See, e.g., MSRB Notice 2009-54 (September 29, 2009).

[2] "Municipal advisor" is defined in Section 15B(e)(4) of the Exchange Act.

[3] See MSRB Notice 2010-33 (August 27, 2010) for a description of the composition of the Board under this new structure.

[4] File No. SR-MSRB-2010-13 (amendments to MSRB Rules A-7 and A-8, which are effective immediately); File No. SR-MSRB-2010-14 (amendments to MSRB Rules A-12 and A-14, which are effective immediately); File No. SR-MSRB-2010-15 (amendments to MSRB Rules D-11 and G-40 and to Form G-40 and new Rules D-13 and D-14, which the MSRB has requested the SEC to make operative on November 15, 2010); and File No. SR-MSRB-2010-16 (amendments to MSRB Rules G-5 and G-17, which will become effective upon approval by the SEC). Comments on these filings should be submitted to the SEC and should reference the applicable file number.

[5] Municipal advisors should note that, pursuant to Section 15B(c)(1) of the Exchange Act, they are subject to a federal fiduciary duty to their municipal entity clients as of October 1, 2010, even before MSRB rulemaking on the subject.

[6] Form G-40 consists of specific data elements provided electronically to the MSRB through its Gateway authentication system, rather than as a paper form.

[7] Amended MSRB Rules A-12 and A-14 are effective today, but have a deferred compliance date of December 31, 2010. The MSRB has requested that the SEC make the amendments to MSRB Rule G-40 and Form G-40 operational on November 15, 2010, but with a deferred compliance date of December 31, 2010. Two other administrative rules -- MSRB Rule A-7 (assessments) and MSRB Rule A-8 (rulemaking) -- are also amended effective today. However, those amendments do not require municipal advisors to take any action. They simply extend the Board's power, as directed by the Dodd-Frank Act, to impose assessments to defray expenses and to write rules for municipal advisors. The text of these amended rules can be found at the end of this notice.

[8] The MSRB has requested that the SEC make the new MSRB definitional rules and amendments to existing definitional rules described in this notice operational on November 15, 2010. The rule text can be found at the end of this notice.

[9] This exception includes employees of a municipal entity, acting in their capacity as such. This exception would not apply in the case, for example, where an individual serves on a part-time basis as a board member or employee of an issuer or other municipal entity while also employed by or doing business as a municipal advisor.

[10] This exception includes associated persons of such registered investment advisers who are providing investment advice. However, investment advisers that are not registered with the SEC under the Investment Advisers Act of 1940, including but not limited to any investment adviser exempted thereunder from registration with the SEC, are not excluded from the definition of "municipal advisor."

[11] This exception includes associated persons of such registered commodity trading advisors who are providing advice related to swaps. Swap advisors should note that the provisions of the Dodd-Frank Act that might result in some swap advisors having to register with the CFTC as commodity trading advisors are not yet effective. In the interim, this exception does not apply to them.

[12] Underlining indicates additions; strikethrough indicates deletions.

[13] Paper Form G-40 is replaced in its entirety by amended electronic Form G-40.